

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 8, 2009

STATE OF TENNESSEE v. KENNETH LEE BURRUS

Direct Appeal from the Circuit Court for Bedford County
No. 16605-06 Lee Russell, Judge

No. M2009-00146-CCA-R3-CD - Filed February 24, 2010

The Defendant, Kenneth Lee Burrus, pled guilty to one count of filing a false report and two counts of violating the sex offender registry. The trial court sentenced the Defendant to three years for each of the violating the sex offender registry convictions and to five years for the filing a false police report conviction. The trial court ordered the Defendant to serve his two three-year sentences consecutively to his five-year sentence for a total effective sentence of eight years in the Tennessee Department of Correction. On appeal, the Defendant contends the trial court erred when it imposed consecutive sentencing. After a thorough review of the record and applicable authorities, we affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and ALAN E. GLENN, JJ., joined.

Michael Jonothan Collins (at trial), Shelbyville, Tennessee, and Andrew Jackson Dearing, III (on appeal), Shelbyville, Tennessee, for the Appellant, Kenneth Lee Burrus.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; Charles Crawford, District Attorney General; Michael D. Randles, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

During the Defendant's plea submission hearing, the State set forth the following

account of the facts underlying this appeal:

In case number 16605, on April 30th of this year the [D]efendant reported to the police department that he had been at Hillard Gardener Park, and he had left his wallet there and realized that he left it there went back and retrieved it, and then some time after that had opened it and realized some money was missing, and then some time later even noticed that a debit card was missing. And he said that he debit card had already been used six times for a total of \$171.64.

The police department looked into this, and they were actually able to see the transactions that were involved, they were at Wal-Mart. So, they went to Wal-Mart and pulled the surveillance video, and it was, in fact, the [D]efendant using the debit card, so consequently, he reported the theft of the card. He had[also] filed a form with his bank to get the money refunded to his account.

[In case number 16606, the sex offender registry violation, the Defendant] was convicted of sexual battery in Rutherford county in June of 2004. He was . . . consequently listed as a sexual offender. He was required to report and register once a year within the 14 day period around his birthday. Detective Hord found out about the [D]efendant being arrested, I believe it was on these charges, and she talked with the [D]efendant and from that she learned that the [D]efendant had changed residence from one residence to another without coming in and notifying her of that, and in that time he admitted that he should have come in and told her that he had changed residences without coming in and updating his information.

Also, [the Defendant's] birthday is February 9, and he did not come in during the seven days proceeding or the seven days following his birthday in 2008 to update his information, so that's the other violation.

Based on this conduct, the Defendant pled guilty to one count of filing a false report and to two counts of violating the sex offender registry.

At the Defendant's sentencing hearing, the Defendant's pre-sentence report was introduced. According to this report, the Defendant graduated from high school in 2001, and the Defendant reported briefly holding several jobs between 2004 and 2008, several of which he either "resigned" or "abandoned." The Defendant was twenty-six years old at the time of sentencing.

The report indicated that the Defendant had three prior convictions: one sexual battery conviction in 2001; one violation of the sex offender registry conviction in 2005; and one driving with a revoked license conviction in 2006. While serving out a probation sentence for the sexual battery conviction, the Defendant violated his probation at least twice, and on each occasion his probation was revoked.

At the conclusion of the hearing, the trial court applied enhancement factor (1) that the Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range, and enhancement factor (8), that the defendant before trial or sentence failed to comply with the conditions of a sentence involving release in the community. *See* T.C.A. § 40-35-114(1), (8) (2006). The trial court found that mitigating factor (1), that the defendant's criminal conduct neither caused nor threatened serious bodily injury, applied but did not give that factor "any significant weight" in sentencing the Defendant. *See* T.C.A. § 40-35-113(1) (2006). Based on these factors, the trial court sentenced the Defendant to three years for each of his violation of sex offender registry convictions and to five years for his filing a false report conviction. As to the alignment of the Defendant's sentences, the trial court found that consecutive sentencing factor (2), that the defendant is an offender whose record of criminal activity is extensive, applied to the Defendant's convictions, and it ordered the Defendant to serve his two three-year sentences consecutively to his five-year conviction, for a total effective sentence of eight years. The Defendant now appeals the trial court's imposition of consecutive sentencing.

II. Analysis

The Defendant contends that the trial court erred when it imposed consecutive sentencing. The Defendant argues that consecutive sentencing was improper because the Defendant is not a "dangerous offender," because there was no "significant time span of undetected activity," and because there was no specific showing of "sufficient damage to victims."

The State responds that the cases cited by the Defendant to support this argument do not apply to this case. Moreover, the State responds that the record establishes that the Defendant has an extensive record of criminal conduct, which supports the imposition of consecutive sentences pursuant to T.C.A. § 40-35-115(b)(2).

It is within the sound discretion of the trial court whether or not an offender should be sentenced consecutively or concurrently. *State v. James*, 688 S.W.2d 463, 465 (Tenn. Crim. App. 1984). A court may order multiple sentences to run consecutively if it finds, by a preponderance of the evidence, that at least one of the following seven factors exists:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation;
or
- (7) The defendant is sentenced for criminal contempt.

T.C.A. § 40-35-115(b)(1)-(7). In addition to these criteria, consecutive sentencing is subject to the general sentencing principle that the length of a sentence should be “justly deserved in relation to the seriousness of the offense” and “no greater than that deserved for the offense committed.” T.C.A. § 40-35-102(1), 103(2); *see also State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002).

At the conclusion of the sentencing hearing, the trial court found that partial consecutive sentencing was proper based on consecutive sentencing factor (2), and it explained its reasoning:

The more challenging question in this one is the issue of consecutive or concurrent sentencing. There is no presumption here in favor of concurrent sentencing, but I am still examining the seven factors that are set out in . . . 40-

35-115. And he does have some prior record present that would certainly suggest a reason for consecutive sentencing, but I don't think it would be appropriate to make them all consecutive. So I am going to have the sex offender registry, the two, concurrent with one another, but consecutive to the sentence in 16605.

The trial court therefore, found that the Defendant's criminal record justified consecutive sentencing under factor (2), but explained that the record did not justify the consecutive alignment of each of the Defendant's sentences.

We conclude that the record does not preponderate against the trial court's finding that the Defendant's record of criminal activity was extensive. As noted above, the Defendant's pre-sentence report reflects that the Defendant had one conviction for sexual battery, one conviction for violating the sex offender registry, and one conviction for driving with a revoked license before he was sentenced in this case. Especially given the Defendant's young age of twenty-six years, these convictions establish the Defendant's extensive criminal history. Thus, the record supports the trial court's finding that consecutive sentencing factor (2) applies. Further, in declining to impose complete consecutive sentencing based on the Defendant's record, the trial court considered whether consecutive sentencing was "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed. *See* T.C.A. § 40-35-102(1), 103(2); *see also Imfeld*, 70 S.W.3d at 708. As such, the trial court properly imposed consecutive sentencing in this case. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude the trial court properly imposed consecutive sentencing in this case. As such, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE